

## Message Text

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DRAFTED BY L/M:JABOYD:EJS

APPROVED BY L/M:KEMALMBORG

NEA/INS: RBMORLEY

JUSTICE: B. A. RISTAU

AID/GC:L.A. GRANT

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FM SECSTATE WASHDC

TO AMEMBASSY NEW DELHI IMMEDIATE

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E.O. 11652: N/A

TAGS: PFOR

SUBJECT: PROPOSED ASSERTION OF SOVEREIGN IMMUNITY  
(UTAAM SINGH DUGAL & CO. V. USAID)

REFTELS: A) NEW DELI 15348; B) NEW DELHI 15386;

C) NEW DELHI 15639

1. SUMMARY: DEPARTMENT IS NOT PERSUADED THAT THIS IS AN APPROPRIATE CASE FOR THE ASSERTION OF DIPLOMATIC IMMUNITY OR SOVEREIGN IMMUNITY AS TO THE CAUSE OF ACTION THOUGH VIENNA CONVENTION ON DIPLOMATIC IMMUNITY IS A BASIS UPON WHICH THE SERVICE OF PROCESS, NOT THE CAUSE OF ACTION, MAY BE REFUSED. DEPT REQUESTS AMEMBASSY TO INFORM GOI THAT SERVICE BY REGISTERED MAIL IS REFUSED UNDER ARTICLE 22 OF THE VIENNA CONVENTION ON DIPLOMATIC IMMUNITY DONE AT VIENNA APRIL 18, 1961, AND THAT SERVICE MAY PROPERLY BE RECEIVED BY DIPLOMATIC NOTE FROM THE GOI TO THE EMBASSY. DEPT REQUESTS EMBASSY TO SEEK THIRTY  
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DAY DELAY IN TIME TO RESPOND DURING WHICH PROCESS MAY BE

PROPERLY SERVED AND SEEKS EMBASSY ADVICE AS TO POSSIBILITY OF SEEKING GOI ASSISTANCE IN DEFENDING SUIT AND PAYING FOR LIABILITY RESULTING THEREFROM.

2. SINCE 1952 USG POLICY HAS BEEN TO ASSERT SOVEREIGN IMMUNITY WITH REGARD TO SOVEREIGN OR PUBLIC ACTS (JURE IMPERII) BUT NOT WITH RESPECT TO PRIVATE ACTS (JURE GESTIONIS). SEE DISCUSSION OF TATE LETTER IN 6 WHITEMAN, DIGEST OF INTERNATIONAL LAW (1968) 569 ET SEQ. IN NOTE OF JUNE 22, 1971, TO HIS EXCELLENCY LAKSHMI KANT JHA, AMBASSADOR OF INDIA, SIGNED BY JOHN R. STEVENSON, THE LEGAL ADVISER, FOR THE SECRETARY OF STATE, THE DEPT REFUSED A REQUEST BY THE GOI FOR A SUGGESTION OF IMMUNITY AS TO ACTS ESSENTIALLY OF A COMMERCIAL NATURE IN A CASE BROUGHT IN A U.S. COURT AGAINST THE GOI. IN THAT NOTE DEPT REAFFIRMED ADHERENCE TO POLICY ANNOUNCED IN TATE LETTER WHICH FAVORS RESOLUTION OF COMMERCIAL PROBLEMS IN COURTS UNDER RESTRICTIVE NOT ABSOLUTE THEORY OF SOVEREIGN IMMUNITY. WHEN DETERMINING IF PUBLIC OR PRIVATE ACT IS IN QUESTION, DEPT LOOKS TO THE NATURE OF THE TRANSACTION, I.E., CONSTRUCTION OF A BUILDING WITH A MERCHANT AS WELL AS A SOVEREIGN CAN UNDERTAKE, NOT THE PURPOSE OF THE TRANSACTION. THUS, THOUGH CONTRACT IS FOR THE PURPOSE OF CONSTRUCTING USG BUILDING, THE CONTRACT IS COMMERCIAL IN NATURE AND NOT SUBJECT TO SOVEREIGN IMMUNITY DEFENSE UNDER RESTRICTIVE THEORY. IF DEPT WERE TO IGNORE LONG STANDING RESTRICTIVE THEORY OF SOVEREIGN IMMUNITY, PLAINTIFF COULD BRING CLAIM IN US COURT OF CLAIMS WHERE USG IS PRECLUDED FROM RAISING SOVEREIGN IMMUNITY DEFENSE. FURTHERMORE, DEPT EXPERIENCE HAS BEEN THAT ASSERTION OF SOVEREIGN IMMUNITY DEFENSE IN SUCH CASES RESULTS IN CONTINUING LEGAL MANEUVERS BY PLAINTIFFS WHICH ARE COSTLY TO DEFEND AGAINST, BOTH IN TERMS OF LEGAL FEES AND IN UNFAVORABLE PUBLICITY AND WHICH CAN RESULT IN ESPOUSAL OF CLAIMS BY HOST GOVT WITH ACCOMPANYING COMPLICATIONS. THUS, ARTICLE I(4) OF INDO-US BILATERAL AGREEMENT (3 UST 2921) IS OF NO BENEFIT AS TO SOVEREIGN IMMUNITY DEFENSE IN THAT, THOUGH AID ENJOYS SAME IMMUNITY WHICH USG ENJOYS, USG LIMITED OFFICIAL USE

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DOES NOT HAVE VALID SOVEREIGN IMMUNITY DEFENSE IN THIS CASE UNDER RESTRICTIVE THEORY. DEPARTMENT'S ANALYSIS WOULD NOT LIKELY BE ALTERED IF GOI WOULD BE WILLING TO ACCORD USG SOVEREIGN IMMUNITY ON BASIS OTHER THAN RESTRICTIVE THEORY OF SOVEREIGN IMMUNITY.

3. ARTICLE 22 OF VIENNA CONVENTION RELATES TO THE INVIOABILITY OF THE PREMISES OF DIPLOMATIC MISSIONS

AND THE DUTY OF THE RECEIVING STATE TO PROTECT THEM FROM INTRUSION OR DAMAGE AND DISTURBANCES OF THE PEACE OR IMPAIRMENT OF ITS DIGNITY. THE NEGOTIATING HISTORY OF THAT ARTICLE (TRAVAUX PREPARATOIRES) MAKES IT CLEAR QTE THAT IT WAS THE UNANIMOUS INTERPRETATION OF THE DRAFTING COMMITTEE THAT NO WRIT COULD BE SERVED, EVEN BY POST, WITHIN TE PREMISES OF A DIPLOMATIC MISSION UNQTE (OFFICIAL RECORDS, VOLUME I, PAGE 141). IN CONSEQUENCE, THE SERVICE OF SUMMONS IN THIS SUIT IS NULL AND VOID, SINCE IT WAS IN VIOLATION OF AN EXPRESS TREATY PROVISION WHICH IS OF DIRECT RELEVANCE TO THE INSTANT SUIT. EMBASSY IS REQUESTED TO SEND DIPLOMATIC NOTE ASSERTING THIS DEFENSE, BUT WE SUGGEST THAT EMBASSY REFRAIN FROM ANY DISCUSSION OF SOVEREIGN IMMUNITY AT THIS JUNCTURE OF THE CASE. STRICTLY SPEAKING, DIPLOMATIC IMMUNITY IS ENJOYED BY USG PERSONNEL IN INDIA ACCREDITED TO GOI. THE ASSERTION OF DIPLOMATIC IMMUNITY IN THIS CASE WOULD APPEAR TO BE INAPPROPRIATE IN THAT SUCH USG PERSONNEL HAVE NOT BEEN SUED IN THEIR PERSONAL CAPACITY.

4. EMBASSY SHOULD INDICATE IN NOTE THAT A DELAY OF AT LEAST THIRTY DAYS IS REQUESTED IN RESPONDING TO THE CLAIM BECAUSE DEPT HAS NOT HAD AN OPPORTUNITY TO READ SAME. AT FIRST GLANCE, DEPT AGREES THAT ARBITRATION CLAUSE IS PROBABLY INVALID AND THAT USG COULD NOT PAY JUDGMENT RENDERED PURSUANT TO IT. DEPT WOULD BE FEARFUL OF COURT APPOINTED ARBITRATOR WHO MIGHT RENDER JUDGMENT AGAINST USG WHICH USG COULD NOT HONOR.

5. DEPT REQUESTS EMBASSY VIEWS ON DESIRABILITY OF APPROACHING GOI TO REQUEST GOI TO LITIGATE AND ASSUME LIMITED OFFICIAL USE

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LIABILITY FOR THIS CASE IN THAT USG GAVE BUILDING TO GOI WHICH IS THE SUBJECT OF THIS LITIGATION. EMBASSY COULD ARGUE THAT BECAUSE GOI RECEIVED BENEFITS OF BUILDING, GOI SHOULD BE WILLING TO ACCEPT BURDEN OF OUTSTANDING LIABILITIES, IF ANY, DERIVING FROM CONSTRUCTION. ALSO, AN INDEPENDENT, PROTRACTED, AND DETAILED REVIEW OF CLAIMS HERE IN QUESTION HAS ALREADY BEEN CONDUCTED IN THE SPIRIT OF THE ARBITRATION CLAUSE.

6. THIS CABLE HAS BEEN CLEARED IN SUBSTANCE ONLY. REQUEST EMBASSY REACTIONS. DEPT WILLING TO HELP IN COMPOSITION OF PROPOSED NOTE IF REQUESTED. INGERSOLL

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## Message Attributes

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**To:** NEW DELHI  
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